

No 499

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,

against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.,*
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE DIVISION OF THE SUPREME COURT
OF THE STATE OF NEW YORK, SECOND
DEPARTMENT AND BRIEF IN SUPPORT
THEREOF.

EMIL J. SONDERLICK,
Petitioner.

by JACOB W. FRIEDMAN,
Attorney for Petitioner.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE DIVISION OF THE SUPREME COURT
OF THE STATE OF NEW YORK, SECOND
DEPARTMENT.**

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Your petitioner Emil J. Sonderlick respectfully prays for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (the highest court in the State of New York in which a determination could be had herein), to review a judgment of that Court entered on February 21, 1944, affirming a judgment of foreclosure and sale of real estate in favor of the respondent Bank entered on an order summarily striking out the amended answer of the petitioner.

On March 20, 1944, the said Appellate Division denied petitioner permission to appeal to the Court of Appeals

of the State of New York, and the Court of Appeals likewise denied such permission on May 25, 1944, so that a determination could not be obtained in any state court higher than said Appellate Division. On August 25, 1944, Mr. Justice Jackson signed an order extending to and including September 25, 1944, the time of petitioner within which to file his petition for certiorari.

Statement of Matters Involved.

On February 27, 1942, respondent Bank commenced this action to foreclose the first mortgage on petitioner's real property located at 8716 Britton Avenue in Elmhurst, Borough of Queens, City and State of New York, by the service of a summons and complaint on one of the defendants named in the action (92-93). The action allegedly was brought for defaults in the payment of interest and taxes (92).

On or about February 28, 1942, the respondent Bank obtained the extension of an illegal and void receivership to its foreclosure action (244).

On February 11, 1943, petitioner was served with the supplemental summons and amended complaint in this action (99-102). He duly interposed his amended answer on April 8, 1943 (107). His amended answer (190-202) contained several denials and two defenses. The first defense, alleging that the respondent Bank had instituted a prior action to foreclose the same first mortgage on or about March 1, 1941 (194-195), was withdrawn by stipulation on June 14, 1943 (335-339).

The second defense alleged that petitioner became the sole owner in fee simple of the said real property by virtue of a deed which was duly recorded in the office of the Register of Queens County on September 9, 1939; that on or about January 16, 1941, all the outstanding property taxes on the said property and the mortgage interest

due the respondent were duly paid up; that on or about January 16, 1941, petitioner was wrongfully deprived of the possession of his said real property and of the rents and profits thereof under the guise of an utterly wrongful, illegal and void receivership purportedly obtained in an action in the Queens County Supreme Court entitled "*Juanita Gelly, Plaintiff, against Anna Kalamon, Joseph Kalamon and Theodore A. Dylewski, Defendants*"; that thereafter the respondent had knowledge and was aware that petitioner was wrongfully deprived of his possession of the said real property and of the rents and profits thereof by the said Hallinan and that the so-called receivership in the *Gelly v. Kalamon* action was wrongful, illegal and void; that thereafter the respondent knowingly accepted and retained divers sums of money from the said Hallinan purportedly in payment of the mortgage interest; that thereafter the respondent had knowledge and was aware that the said Hallinan had neglected and failed to keep the said real property in reasonably good repair; that thereafter the said Hallinan intentionally and wrongfully neglected and failed to continue to pay the mortgage interest and the property taxes on the said real property; that on or about March 1, 1942, respondent commenced this foreclosure action and obtained the extension of the so-called receivership in the *Gelly v. Kalamon* action to this foreclosure action; that the respondent commenced this action and obtained the extension of the so-called receivership to this action in a wrongful endeavor to abet and allow the said Hallinan to escape from the wrongful, illegal and void receivership in the *Gelly v. Kalamon* action (195-202).

Respondent made a motion (77-89) for "judgment for the relief demanded in the amended Complaint and for an Order striking out the Answer of the Defendant, Emil J. Sonderlick, under Rule 113 of the Rules of Civil Practice on the ground that there is no defense to the action * * *" (85).

In support of its motion, respondent submitted the affidavit of James A. Finn, a vice-president of the respondent Bank (136-148), and the affidavit of Joseph C. Wolf, one of its attorneys (90-134).

The Finn affidavit set forth no facts or evidence to rebut the second defense in petitioner's amended answer (210). Finn's affidavit merely stated (146-147):

"Upon information and belief the Plaintiff had no knowledge as to whether or not the Receivership was void or illegal and further that the Plaintiff commenced this action solely by reason of the defaults hereinabove set forth and solely for the purpose of protecting its interest in the mortgaged premises."

and that (147):

"Your deponent has been advised by the Attorney for the Plaintiff Bank that the Amended Answer interposed in this action by Emil J. Sonderlick, verified the 6th day of April, 1943, is without merit and that there is no defense to said foreclosure action and that said Answer has been interposed merely for the purpose of delay and your deponent verily believes this to be true."

The Wolf affidavit likewise set forth no facts or evidence to rebut the second defense. It merely referred to the aforementioned unsubstantiated averments in the Finn affidavit but omitted to state that the Finn averments were made only upon information and belief (122-128). The Wolf affidavit does set forth the following untenable argument (125-126):

"* * * Furthermore, assuming for the purpose of argument that the receivership was illegal it was not incumbent upon the Plaintiff herein to determine the

legality or illegality of the receivership. The Plaintiff had the right to foreclose its mortgage and had the right to have a receiver appointed for its benefit. At the time of the commencement of the action, the premises were in the possession of a receiver duly appointed by an order of the Court. Under Rule 179 of the Rules of Civil Practice and under the decisions construing that section the Plaintiff was obliged to have the receivership extended for its benefit. It could not have a new receiver appointed. Therefore, insofar as the Plaintiff is concerned, whether or not the receiver in possession was rightfully or wrongfully is immaterial."

Nowhere in the two moving affidavits was there even a denial of the allegations of the second defenses that the respondent had commenced this foreclosure action and obtained the extension of the illegal receivership to this action in a wrongful endeavor to abet and allow the said Hallinan to escape from the wrongful, illegal and void receivership in the *Gelly v. Kalamon* action (223-224). Nor do the moving affidavits set forth any grounds exempting the respondent Bank from the "clean hands" doctrine in this foreclosure action (224).

After setting forth the reasons why the respondent was not entitled to a summary judgment on its moving affidavits (205-225), petitioner showed by facts and documentary evidence and admissions that his second defense was a bona fide defense and sufficient to defeat respondent's foreclosure action (225-306).

The so-called receivership in the *Gelly v. Kalamon* action was illegal and void because:

1. On the date of the appointment of Hallinan as receiver, petitioner was the record and sole owner in fee simple of the said real property (226, 228).

2. The appointment of the so-called receiver was made without notice to petitioner as the owner of the said real property (228).

3. Petitioner never was a party in the *Gelly v. Kalamon* action (229).

4. Petitioner's real property was not even the subject matter of the *Gelly v. Kalamon* action and was so adjudicated by the Queens County Supreme Court in its order of October 2, 1939, vacating the *lis pendens* that was filed in the *Gelly v. Kalamon* action (229, 259-264).

5. The appointment of the so-called receiver was in complete violation of section 121 of the New York Civil Practice Act which specifically provides (230):

“* * * After a notice of pendency of action has been cancelled, neither the proceedings in the action nor any judgment which may be rendered therein shall affect the real property described in any such cancelled notice.”

6. The resettled judgment in the *Gelly v. Kalamon* action which was entered on December 15, 1939, made no mention of petitioner, and can have no bearing upon his rights to the ownership of the said real property, both by virtue of its own terms and by virtue of the order vacating the *lis pendens*, and can be attacked collaterally because it is founded on a complaint which is insufficient on its face for the wholly independent reason, among others, that it does not comply with the New York Real Property Law, section 442-d (231).

Altho petitioner informed the respondent's president on several occasions (296-301, 302-306) that respondent's representatives had connived to extricate Hallinan from the void *Gelly v. Kalamon* receivership, not once did the respondent deny petitioner's charges of collusion and

connivance between its representatives and Hallinan (249-256). Nor has it renounced the acts and omissions of its representatives. Instead, it has ratified and approved of said acts and omissions (255-256).

The extent of the "co-operation" to "receiver" Hallinan may be gauged by the fact that "The bank, however, did not object to the receiver balancing his account with moneys collected after February 28, 1942, to wit: the March rents of \$218 * * *. Had the bank insisted upon the receiver accounting to it for the full March rents, plaintiff (Gelly) may have had to make up a deficiency of \$120.58." The quotation last mentioned is from a decision in the *Gelly v. Kalamon* action (248-249).

In a letter of December 10, 1942, some time prior to the service of process upon petitioner, the respondent's president made the following admission against interest (307-311):

"We will not settle and discontinue the present action unless all claims arising out of, or in any way connected with, such action are waived by you through the execution of a proper release."

Wolf's reply affidavit (311-330) raised additional issues of fact that should have been remitted to trial for determination and improperly were summarily decided upon the affidavits.

Question Presented.

Was the summary dismissal without a trial of petitioner's amended answer, which dismissal was predicated on affidavits failing to rebut petitioner's defenses of the invalidity of the receivership and of respondent's collusive conduct and whereby petitioner was deprived of his property without a trial, due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States of America?

Reasons for Allowance of Writ.

1. Petitioner, through the decision of the Court below, has been deprived of valuable real property, his title thereto has been ignored and he has been denied the opportunity of ousting those wrongfully in possession of his property.

2. His title to this property has been nullified on the basis of an alleged prior adjudication in an action to which he was not a party, and in disregard of the plain provisions of New York Civil Practice Act, section 121.

3. He has been ousted of his possession through the medium and extension of a void receivership granted without notice to him as owner of the said real property.

4. He has been deprived of a trial on the merits.

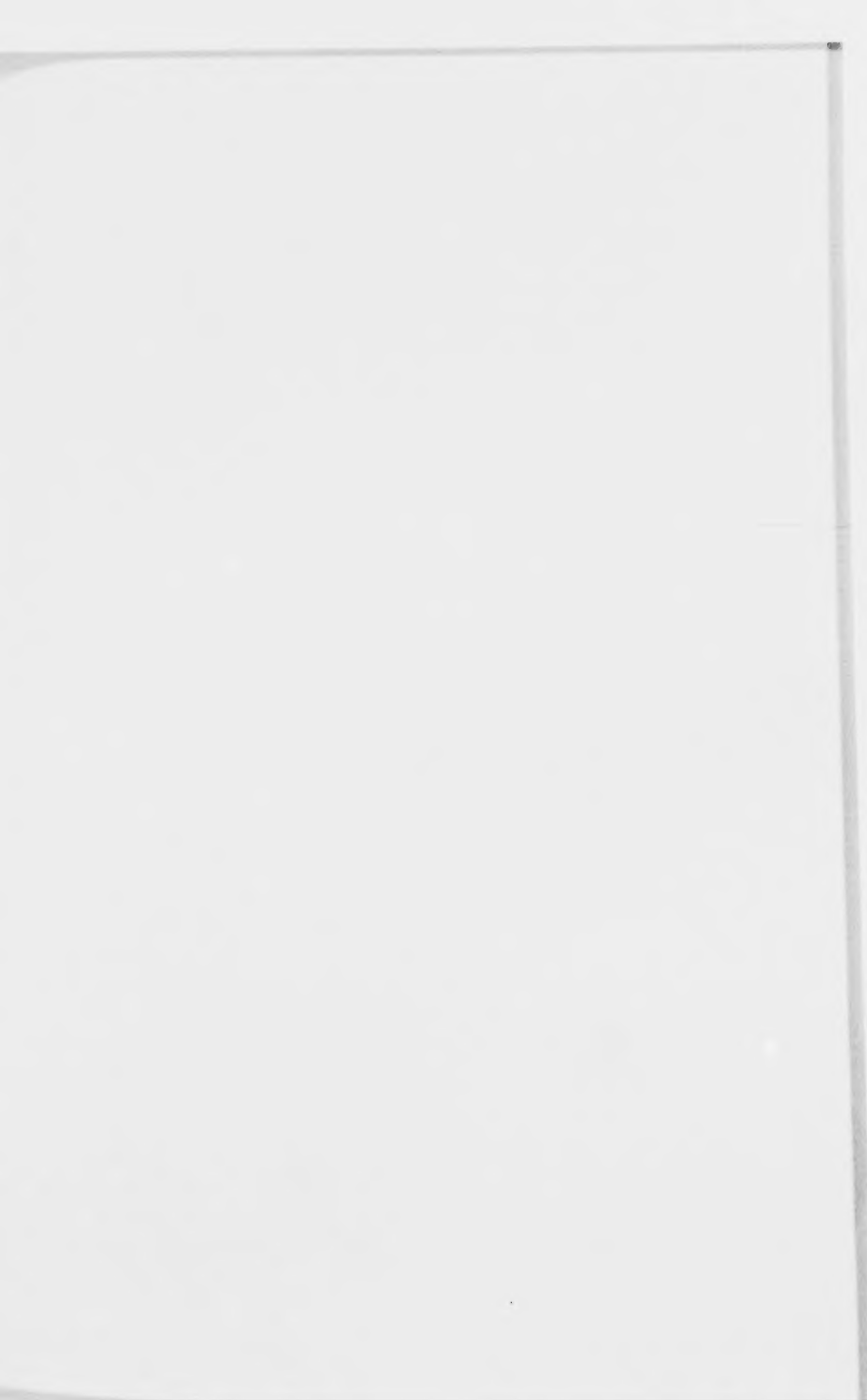
5. All of the foregoing proceedings are grossly violative of his rights under the Fourteenth Amendment of the Constitution.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Division of the Supreme Court of the State of New York, Second Department, commanding said Court to certify and send to this Supreme Court, on a day to be designated, a full and complete transcript of the record and all proceeds of the said Appellate Division had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the said Appellate Division be reversed, and that petitioner be granted such other, further and different relief as may be just and proper.

Dated, New York, N. Y., September 22, 1944.

EMIL J. SONDERLICK,
Petitioner,

by JACOB W. FRIEDMAN,
Counsel for Petitioner.





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OCTOBER TERM, 1944

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,

against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.*,
Defendants.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by any of the courts below except the following:

Supreme Court—Special Term.

New York Law Journal—August 3, 1943.

By Mr. Justice Colden.

Emigrant-Indus. Sav. Bank v. Sonderlick—Two motions: (1) By the plaintiff in an action to foreclose a first mortgage for summary judgment striking out the amended answer of the defendant Sonderlick and for the appointment of a referee to compute, and (2) by said defendant to vacate the extended receivership. A consideration of the papers submitted leads to the conclusion that no triable issues exist and that there is no merit to the defendant's amended answer

or to his cross-motion to vacate the extended receivership. The plaintiff's motion is accordingly granted and that of the said defendant in all respects denied. Submit orders.

Jurisdiction.

The judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, now sought to be reviewed, was entered on February 21, 1944. On March 20, 1944, the same Court denied petitioner's motion for permission to appeal to the Court of Appeals of the State of New York. The Court of Appeals denied like permission on May 25, 1944. On August 25, 1944, Mr. Justice Jackson, of the Supreme Court of the United States, signed an order extending petitioner's time to apply for certiorari to and including September 25, 1944.

The jurisdiction of this Supreme Court is invoked under Section 237 (b) of the Judicial Code as amended, 28 U. S. C., Section 344 (b).

Petitioner, in his application for permission to appeal to the Court of Appeals, duly raised the constitutional question and urged that the summary dismissal of his amended answer is reconcilable neither with the law nor the plain justice of the case and constitutes a deprivation of his property without due process of law, in violation of the Constitution of the United States of America, Amendment Fourteen, and of the Constitution of the State of New York, Article I, Section 6.

Statement of the Case.

A summary statement of the case is set forth in the petition.

Specification of Errors to be Urged.

It is intended by petitioner to urge as errors, unless limited by this Supreme Court, all of the matters set forth in the petition as reasons for the allowance of the writ.

Argument.

1. *The respondent was not entitled to a summary judgment because its moving affidavits were insufficient and inadequate and because issues of fact were raised by the petitioner's affidavit in opposition and by respondent's reply affidavit. Dwan v. Massarene, 199 App. Div. 872.*

2. *Petitioner has shown that his defense is bona fide, of a substantial character and was interposed in good faith. Dwan v. Massarene, supra.*

3. *Respondent cannot procure the benefit of the extension of the receivership to its action because the original order appointing Hallinan a receiver in the Gelly v. Kalamon action was void. Brooklyn Empire Const. Co., Inc. v. Cinak Realty Corporation et al., 234 App. Div. 428.*

4. *The dismissal of petitioner's amended answer without a trial and on the basis of an alleged adjudication in an action to which he was neither party nor privy was a deprivation of property without due process of law, in violation of the Constitution of the United States, Amendment XIV. Postal Telegraph-Cable Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.*

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

EMIL J. SONDERLICK,
Petitioner,

by JACOB W. FRIEDMAN,
Attorney for Petitioner.





OCT 23 1944

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

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No. 499

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,
against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.,*
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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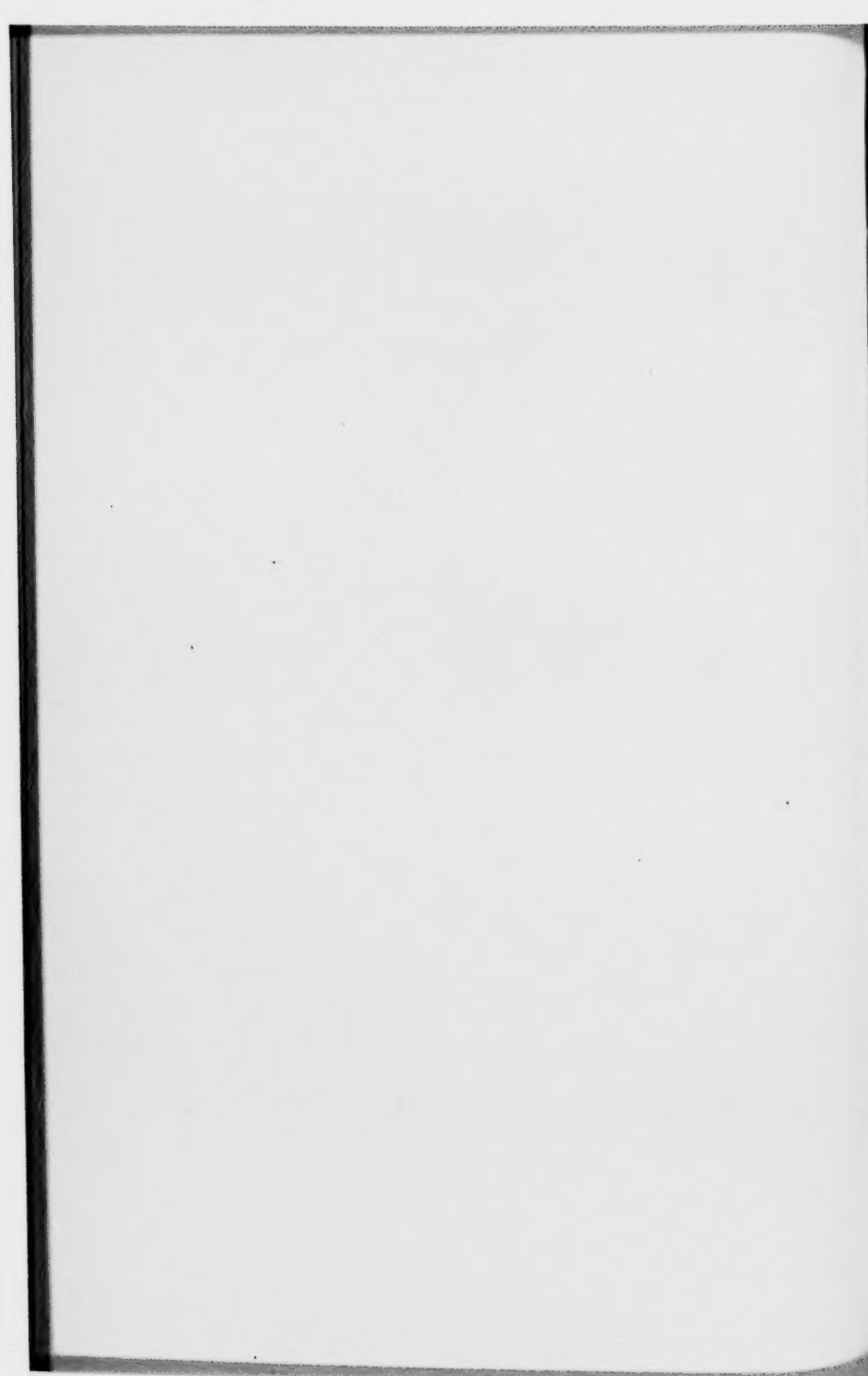


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Supreme Court of the United States

OCTOBER TERM, 1944

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Plaintiff-Respondent,

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No. 499

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

No opinion was written by the Courts below except a memorandum decision of Special Term of the Supreme Court of the State of New York (R. 111).

Jurisdiction

Petitioner has invoked the jurisdiction of the Supreme Court under Section 237(b) of the Judicial Code as amended, 28 U. S. C. Section 344(b).

Statement

Respondent held a first mortgage on the real property at 8716 Britton Avenue, Elmhurst, Queens County, New York (R. 53). The principal amount of the mortgage was

\$20,950 (R. 47). In November, 1941, the mortgage fell into default when the interest and taxes were not paid. The complaint was in the usual form, alleging that the interest and taxes were unpaid and that, because of the failure to make such payments, the entire principal amount had become due (R. 51-53).

When the foreclosure action was begun in February, 1942, the real property covered by the mortgage was in the possession of Thomas J. Hallinan, who had been appointed Receiver of the property in an action entitled "*Gelly v. Kalamon*," which was a suit in the nature of an accounting involving rents derived from the real property. In accordance with the provisions of Rule 179 of the Rules of Civil Practice, providing in part that "where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary." Respondent obtained the extension of the receivership to include the foreclosure action. Accordingly, Thomas J. Hallinan became the Receiver in this foreclosure action.

The amended answer of Petitioner, after making various admissions and denials, set up two affirmative defenses. The first defense was to the effect that there was another foreclosure action pending upon the same property (R. 65). That defense was, however, subsequently withdrawn by stipulation (R. 112). The second defense was to the effect that the original receivership was void, that the extended receivership was likewise void, and that Respondent had conspired with the Receiver for the purpose of allowing him to escape the consequences of the illegal receivership (R. 66-67).

After issue had been joined, Respondent made a motion for summary judgment. Petitioner made a cross-motion

for an order vacating the extended receivership. The motions were heard together at Special Term of the Supreme Court. Respondent's motion for summary judgment was granted, and Petitioner's cross-motion to vacate the extended receivership was denied.

Petitioner appealed to the Appellate Division of the Supreme Court, Second Department, which unanimously affirmed both determinations (267 App. Div. 764, Case 2; 267 App. Div. 880, Case 2).

Thereafter, Petitioner made a motion in the Appellate Division for permission to appeal to the Court of Appeals from the order granting Respondent's motion for summary judgment. The motion was denied by the Appellate Division (267 App. Div. 909).

Subsequently, Petitioner made a motion in the Court of Appeals for permission to appeal. That motion was likewise denied on May 25, 1944.

ARGUMENT

There is no federal question involved in this case.

Careful examination of the Record fails to disclose the existence of any federal question. Under Rule 113 of the Rules of Civil Practice, it is provided generally that the answer in an action may be stricken out unless the Defendant shows by affidavit or other proof that there is a triable issue of fact. In this case Petitioner did not meet the requirements of the rule. He failed to show that there was any triable issue of fact. Accordingly, the Court concluded "that no triable issues exist and that there is no merit to

the defendant's amended answer or to his cross-motion to vacate the extended receivership" (R. 111). The Court's decision was made upon the papers which were submitted on the motion for summary judgment, namely, the pleadings and the affidavits. The papers considered on the motion are recited in the Order (R. 21-23). Petitioner, therefore, is in error when he says that he was deprived of his property because of an adjudication in another action to which he was not a party (Brief pp. 8, 11). The plain fact is that he lost the property because he failed to pay the interest and taxes. The Record shows that when the motion for summary judgment was made, the interest defaults were \$2,054.52 and the tax defaults were \$1,716.96 (R. 47, 48).

There were, it is true, other adjudications in which the Courts had passed upon questions which were germane to this foreclosure action. Those adjudications showed conclusively that the extraneous points raised by Petitioner in this action were without merit. For example, Petitioner contended, and still contends, that the original receivership, which was extended to include this foreclosure action, was illegal and void. The original receivership was obtained in an action entitled "*Gelly v. Kalamon and others*," which was an action in the nature of an accounting involving the rents derived from the real property, which is the subject of this foreclosure action. When the Receiver was appointed in the *Gelly* action, Petitioner immediately moved in that action as attorney for Kalamon, one of the defendants, and also on his own behalf, as owner of the mortgaged premises, for an order vacating the receivership on the ground that it was illegal and void. The motion was denied in the Supreme Court, and the order denying the motion was unanimously affirmed by the Appellate Division, Second Department (262 App. Div. 875).

When the receivership in the *Gelly* action was extended to include this foreclosure action, the Receiver moved to settle his accounts for the period extending from the date of his original appointment to the date of extension. The Receiver's motion to settle the accounts was opposed by Petitioner, but the motion was granted. Petitioner took an appeal from the Receiver's order of settlement and discharge, and the order was unanimously affirmed by the Appellate Division, Second Department (265 App. Div. 967).

Petitioner then commenced an action in the Supreme Court of the State of New York, Bronx County, against the Receiver on the ground that the original receivership was illegal and void. In that action the Receiver made a motion for summary judgment, which was granted in the Supreme Court. Judgment in favor of the Receiver was thereupon entered. Petitioner appealed from the judgment, but it was unanimously affirmed by the Appellate Division of the Supreme Court, First Department.

Petitioner's claim to sole ownership of the property is at variance with the facts. In an action entitled "*Joseph Kalamon v. Anna Kalamon and Emil J. Sonderlick*," in the Supreme Court of the State of New York, Queens County, Joseph Kalamon recovered an interlocutory judgment by default, entered February 5, 1941, cancelling and setting aside the deed under which Petitioner claimed title to the premises. The Petitioner moved to vacate the interlocutory judgment, and his motion was granted at Special Term of the Supreme Court, Queens County. That decision, however, was reversed by the Appellate Division, Second Department, which reinstated the judgment cancelling and setting aside Petitioner's deed (262 App. Div. 762). Petitioner applied to the Court of Appeals for permission

to appeal, but the application was denied (287 N. Y. 755). Thereupon a final judgment was entered, cancelling and setting aside the deed under which the Petitioner claimed title to the premises.

Petitioner has raised four points in his argument (Brief p. 11). None of those points is sufficient to raise a federal question.

In the first point, Petitioner contends that Respondent's moving affidavits on the motion for summary judgment were insufficient, and that his own affidavits raised questions of fact. That, of course, is purely a state question, and the Courts have decided against Petitioner on that point.

In the second point, Petitioner contends that his defense was bona fide, substantial and in good faith. Again, that was a matter for the state Courts to decide, and they have decided it against Petitioner.

In the third point, Petitioner contends again that the original receivership was void. That also is a state question which has been decided against Petitioner on several occasions by the state Courts.

In the fourth point, Petitioner contends that he was deprived of his property without due process of law because his answer was dismissed without a trial, and on the basis of an alleged adjudication in another action to which he was neither party nor privy. We have already shown that Petitioner's answer in the foreclosure action was stricken out by the Court because he failed to raise any triable issue of fact, and not because of an adjudication in any other action. We have also shown that Petitioner's repeated statements that he was neither party nor privy to the *Gelly* action are contrary to the facts. In the *Gelly* action, Peti-

tioner appeared as attorney for one of the defendants, and also intervened, in his own behalf, in an effort to vacate the receivership on the ground that it was illegal and void.

Thus it appears that the only suggestion of a federal question in this case is Petitioner's gratuitous statement in his brief, and in his motions for permission to appeal in the Appellate Division and in the Court of Appeals, that there is one.

The Record does not show that any federal question was presented to the state Courts or was decided by them. Indeed, it appears affirmatively from the Record that the case involved only state questions. Under those circumstances, this Court has consistently refused to grant a writ of certiorari.

"We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

Southwestern Bell Telephone Co. v. Oklahoma
(1938), 303 U. S. 206, 212.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN A. BERKERY,
JOHN E. McANIFF,
Counsel for Respondent.

October 21, 1944.



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Defendants.

PETITION FOR REHEARING.

EMIL J. SONDERLICK,
Petitioner.

by JACOB W. FRIEDMAN,
Attorney for Petitioner.



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Defendants.

No. 499

PETITION FOR REHEARING.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Your petitioner respectfully prays this Court to reconsider its determination made on November 6, 1944, which denied his petition for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department, to review a judgment of that Court affirming a judgment of foreclosure and sale in favor of the plaintiff-respondent Bank entered on an order summarily striking out the amended answer of the defendant-petitioner. On December 1, 1944, the Chief Justice signed an order extending to December 26, 1944, the time of your petitioner to file a petition for rehearing.

Plaintiff-respondent herein was not entitled to a judgment of foreclosure in view of the situation disclosed by your petitioner. The latter filed an affidavit, amply supported by record and indisputable facts, showing that he

had been deprived of the property through the medium of a void receivership; and that plaintiff acted in collusion with the receiver to create colorable defaults in mortgage interest and taxes, with the result that the foreclosure was commenced and the original void receivership extended to embrace the foreclosure action. The purpose of this course was shown to be an endeavor to enable the receiver to escape liability for his illegal conduct. Certainly the existence of this inequitable conspiracy sufficed to defeat any equitable remedy plaintiff might otherwise have had. In opposition to the charges plaintiff adduced nothing but conclusory affidavits of persons having no knowledge of the facts. It was nowhere denied that the extension of the alleged receivership had its genesis in an attempt to exonerate the receiver from the consequences of his void receivership. Had these issues been resolved adversely to your petitioner after a trial, there might be some merit in respondent's argument. But for the courts below summarily on motion to deprive petitioner of a trial notwithstanding the showing made, constitutes a marked impairment of the elements of due process.

We have no desire to labor the points heretofore made, but it would seem that the entire process whereby your petitioner was ousted from his property was a marked departure from the customary requirements of litigation of this character. Your petitioner was the sole record owner when a receiver of his property was appointed without notice to him in his capacity as such owner. The receiver was appointed in an action to which your petitioner was no party, and the property was not even the subject of the action; indeed, the state Supreme Court held that the property was not involved in the action, in consequence vacating a notice of pendency wrongfully filed. Following the vacating of that notice, the outcome of the action could not lawfully affect the title to the

property (New York Civil Practice Act, Section 121). Therefore, the judgment in that action could not—for the dual reason that the statute forbade and that neither your petitioner nor his privy was party thereto—have any bearing upon your petitioner's title. Notwithstanding all the foregoing incontrovertible facts, respondent was able, through its proceedings taken herein, to cloak with some semblance of legality the void receivership that was the outgrowth of the first action, to act in collusion with the receiver to divest your petitioner of his rights and, finally, to foreclose him without a trial. We venture to say that nowhere in the records of this Court will there be found any situation wherein so little regard has been shown for the orderly processes of law or where they have been so flagrantly abused to extinguish valuable property rights.

Your petitioner felt that this Court, his last recourse, would be loath to sanction the validity of the proceedings which have been invoked to take from him his property. He feels that upon complete review it will be found that they do not measure up to the exacting standards of due process within the meaning of the Constitution.

Conclusion.

For the foregoing reasons, as well as those previously advanced, your petitioner respectfully urges this Court to reconsider and change the determination heretofore made denying the writ of certiorari, and that it grant such writ to the Appellate Division of the Supreme Court of the State of New York, Second Department, to review the judgment involved.

Respectfully submitted,

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